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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

NO. 744

DR. GEORGE J. BETO, DIRECTOR,
TEXAS DEPARTMENT OF CORRECTIONS,
Petitioner

vs.

LEON SPENCER,
Respondent

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TABLE OF CONTENTS

		Page
I.	JUDGMENT TO BE REVIEWED	1
II.	JURISDICTIONAL GROUNDS	2
III.	QUESTIONS PRESENTED	2
IV.	CONSTITUTIONAL PROVISIONS INVOLVED	3
V.	STATEMENT OF THE CASE	3
VI.	ORIGINAL FEDERAL JURISDICTION	7
VII.	ARGUMENT	7
	A. FIRST POINT ARGUED	7
	B. SECOND POINT ARGUED	10

APPENDICES

APPENDIX A
Spencer v. Beto, 298 F.2d 500 i

APPENDIX B
Stipulation ix

APPENDIX C
Pittman v. Texas, — S.W. 2d — xiii

APPENDIX D
Evans v. Texas, 430 S.W. 2d 502 xxxv

APPENDIX E
Ellison v. Texas, — S.W. 2d — xlv

APPENDIX F
Bryan, William Clark Jr., Ex parte, — S.W. 2d — li

APPENDIX G
Scott v. Texas, — S.W. 2d — lix

TABLE OF AUTHORITIES

Cases	Page
Bryan, William Clark Jr., Ex parte, — S.W. 2d — (Appendix F)	13
Cox v. Louisiana, 379 U.S. 538	14
Cox v. New Hampshire, 312 U.S. 569	14
Ellison v. Texas, — S.W. 2d — (Appendix E)	13
Evans v. Texas, 430 S.W. 2d 502 (Appendix D)	14
Pittman v. Texas, — S.W. 2d — (Appendix B)	10
Poulos v. New Hampshire, 345 U.S. 395	14
Scott v. Texas, — S.W. 2d — (Appendix G)	13
Shuttlesworth v. City of Birmingham, 382 U.S. 87	14
Spencer v. Beto, 298 F. 2d 500	1
Spencer v. Texas, 385 U.S. 554	4
Witherspoon v. Illinois, 391 U.S. 510	2, 6, 7, 10, 13

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PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

COMES NOW Dr. George J. Beto, Director of the Texas Department of Corrections, hereinafter designated Petitioner, complaining of Leon Spencer, hereinafter designated Respondent, and requesting that this Court grant a Writ of Certiorari directed to the United States Court of Appeals for the Fifth Circuit in the cause and for the reasons set forth below.

I.

Review is sought of the cause styled Leon Spencer v. Dr. George J. Beto and being cause number 25548 on the docket of the United States Court of Appeals

for the Fifth Circuit and reported at 298 F.2d 500, copy of which is attached hereto as Appendix A for the convenience of the court.

II.

The jurisdiction of this court is invoked pursuant to Rule 19 and Rule 23 of this Court based upon the following:

A. The opinion of the Court of Appeals was issued on July 18, 1968. Timely motion for rehearing was filed on July 30, 1968. Mandate was issued on August 20, 1968.

B. Petitioner's motion for rehearing was denied August 12, 1968. Petitioner has sought no order extending the time for filing petition for certiorari beyond November 10, 1968, (the due date).

C. This petition for certiorari is authorized under the provisions of Title 28 §§ 1254, 2101, United States Code.

III.

The following questions are presented for review:

A. Did the Court of Appeals err in applying the principles of *Witherspoon v. Illinois,* (1968) 391 U.S. 510, to the instant cause where the stipulation of the parties clearly recited that jurors who were excused for cause stated *unequivocally* that they *could not, in any case,* inflict the death penalty?

B. Did the Court of Appeals err by construing Texas procedure for selecting jurors in a capital case in a manner which conflicts with the construction of such procedure placed by the Texas Court of Criminal Appeals and without

inspecting the voir dire examination of prospective jurors (which was tendered to the Court of Appeals)?

IV.

The Constitutional provisions involved are the Sixth and Fourteenth Amendment to the Constitution of the United States, to-wit:

A. VIth Amendment.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

B. XIVth Amendment (pertinent portion).

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

V.

Respondent was convicted in August, 1964, of the murder of his wife. He had theretofore been convicted

of the murder of his first wife and under Texas recidivist statutes he was charged with repetition of capital offenses. Under Texas law (and the proof adduced) the jury had a choice between life imprisonment and death in the electric chair. The jury fixed the punishment at death.

He appealed to the Court of Criminal Appeals of Texas (court of last resort for criminal matters) on only one of various grounds presented in the instant cause. His case was affirmed.

This Court granted certiorari on the propriety of Texas recidivist statutes. The case was affirmed in *Spencer v. Texas,* 385 U.S. 554 (1967). On September 12, 1967, Respondent was sentenced to be executed on November 20, 1967.

Respondent then applied to the Criminal District Court of Jefferson County, Texas, (the original trial court) for a writ of habeas corpus setting forth the following grounds:

(1) That Texas' license to juries in capital cases to choose between the penalties of life and death, in the jurors' unfettered, unreviewable and unregulated discretion, deprived petitioner of his life in violation of the rule of law essential to the Due Process Clause.

(2) That Texas' practice of trying the issues of guilt and punishment simultaneously in a capital case was fundamentally unfair, and unconstitutionally forced petitioner to elect between his privilege against self-incrimination and his right of allocution.

(3) That the exclusion from petitioner's trial jury of persons conscientiously scrupled

against the death penalty deprived petitioner of a jury that was a cross-section of the community, and resulted in an unfair and biased jury.

(4) That the death penalty imposed upon petitioner constituted (for several reasons) cruel and unusual punishment.

(5) That the admission of evidence of a former conviction under the Texas recidivist statute denied petitioner a fair trial as guaranteed by the due process clause.

This petition was denied without hearing on October 6, 1967. A similar application was denied by the Texas Court of Criminal Appeals on October 19, 1967, without written order.

On November 9, 1967, the instant petition for habeas corpus was filed in the United States District Court (Eastern District, Texas, Beaumont Division), urging the five grounds set forth supra and the additional ground (for the first time) that respondent, under the Due Process and Equal Protection clauses of the United States Constitution, was entitled to court appointed counsel during the period between the termination of appellate procedures and execution.

Hearing was set for November 14, 1967. At such hearing United States District Judge Joe J. Fisher first indicated an intention to deny all relief out of hand but subsequently determined to hold a hearing on November 16, 1967, and instructed counsel for respondent to present affidavits of expert witnesses and suggested stipulations to support his various points.

At the November 16th hearing counsel for Respondent submitted a suggested stipulation setting forth the

proof which he thought would be available to show by expert testimony that jurors having no conscientious scruples against death would be more likely to convict than jurors who expressed conscientious scruples (and related matters). This suggested stipulation was accepted by the court over objection by and without concurrence of counsel for petitioner. Testimony was also taken from a representative of the N.A.A.C.P. Legal Defense Fund as to what could be offered in the way of expert testimony if more time was available.

Also a stipulation was entered into by agreement between counsel for both parties and accepted by the court as to the number of prospective jurors excused for cause and the extent to which they showed themselves unable to vote for the death penalty. This stipulation is reproduced from the reporter's notes and attached hereto as Appendix B.

The United States District Court ruled against respondent and appeal was taken to the United States Court of Appeals with the sole specification of error that the District Court had erred by not granting a full evidentiary hearing on the six alleged specifications. Notice of Appeal was filed on December 13, 1967, and the Court of Appeals ordered the hearing expedited.

After briefs had been submitted and arguments had been heard, the United States Supreme Court issued its opinion in *Witherspoon v. Illinois,* 391 U.S. 510. Subsequent thereto the Court of Appeals issued the opinion which is the subject of this petition for certiorari. Petitioner raised the points submitted herein on motion for rehearing but same was overruled without opinion. It was in such motion for rehearing that

petitioner made a tender to the court of a transcript of the voir dire interrogation of prospective jurors at the original trial.

VI.

Respondent relied on 28 U.S.C. §§ 2241 and 2242 and the XIVth Amendment to the United States Constitution to establish jurisdiction in the United States District Court.

VII.

As a general prelude to specific discussion of each of the grounds set forth as bases for the granting of a writ of certiorari, petitioner would like to call the attention of the court to the three different ways in which the instant decision creates compelling legal reasons for review by this Court to-wit:

1. The United States Court of Appeals has decided an important question of federal constitutional law which has not been, but should be, settled by the Supreme Court of the United States.

2. The United States Court of Appeals has decided a federal constitutional question in a way in conflict with applicable decisions (if, indeed *Witherspoon v. Illinois* is applicable) of the Supreme Court of the United States.

3. The United States Court of Appeals has decided an important state question in a way in conflict with applicable state law.

A.

PETITIONER'S FIRST POINT RESTATED

Did the Court of Appeals err in applying the principles of *Witherspoon v. Illinois,* (1968) 391 U.S.

510, to the instant cause where the stipulation of the parties clearly recited that jurors who were excused for cause stated *unequivocally* that they *could not, in any case,* inflict the death penalty?

In the Opinion of the Court of Appeals entered on July 18, 1968, the following statement appears in footnote 3 on page 502 of the opinion.

> "The stipulation entered into below indicates that these veniremen may have had very strong scruples against the death penalty. However, the nature of their scruples does not rise to the situation discussed in *Witherspoon* where the veniremen are opposed to capital punishment 'that they would *automatically* vote against the imposition of capital punishment *without regard to any evidence that might be developed at the trial of the case before them,* (Emphasis added by the Court) or . . . that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.' *Witherspoon v. Illinois,* 1968, 391 U.S. 510, 36 U.S.L.W. 4504, n. 21 (U.S., June 4, 1968)."

The pertinent portion of the stipulation (See Appendix A) states:

> "A number of the remaining veniremen, aside from those who were selected as the final twelve, were excused for various reasons, included among these were *twenty-one who were challenged for cause and excused by the Court for the reason that* they had scruples against the infliction of the death penalty and *who stated unequivocally that they could not, in any case, inflict the death penalty."* (Emphasis added.)

and further states:

> ". . . not been allowed to strike for cause those

persons opposed to the death penalty *unequivocally*, . . ." (Emphasis added.)

and further states:

". . . the jury having persons thereon who were *unalterably* opposed to the law of the case, a portion of which was the death penalty." (Emphasis added.)

A comparison of the language used in *Witherspoon*, supra, and the language used in the stipulation in the instant cause clearly shows that *Witherspoon* is specifically not applicable as a grounds for reversing this case. As Mr. Justice Stewart stated at Page ____ of the *Witherspoon* opinion:

"The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. *Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them."* (Emphasis added.)

It is difficult to perceive how Mr. Justice Stewart could have been more emphatic in delineating that which remained outside the orbit of the *Witherspoon* decision. It is equally difficult to perceive how the judges of the Court of Appeals could hold that the stipulated mental position of the excused jurors did not exactly comport with the state of mind described by Mr. Justice Stewart—and the stipulation was entered into prior to the release of the *Witherspoon* opinion.

Petitioner submits that persons "who stated unequivocally that they could not, in any case, inflict the death penalty" (the instant case) and persons "who say that they could never vote to impose the death penalty" (the *Witherspoon* opinion) constitute a single, indivisible class. Any effort to differentiate these two descriptions is neither more nor less than an exercise in misguided semantics and such errant pedantry should not be allowed to sweep the carefully developed criminal jurisprudence of a sovereign state into oblivion at the stroke of a pen.

Petitioner strongly urges this Court to review this matter in the light of the same record as the Court of Appeals had before it and to hold again, as was done in the *Witherspoon* opinion, that this type of procedure is not condemned.

B.

PETITIONER'S SECOND POINT RESTATED

> Did the Court of Appeals err by construing Texas procedure for selecting jurors in a capital case in a manner which conflicts with the construction of such procedure placed by the Texas Court of Criminal Appeals and without inspecting the voir dire examination of prospective jurors (which was tendered to the Court of Appeals)?

Subsequent to the instant decision, the Court of Criminal Appeals of Texas had occasion to interpret the Texas practice of choosing juries in death penalty cases in the light of *Witherspoon v. Illinois,* supra, in *Pittman v. Texas,* —— S.W. (2d) —— (not yet reported but reproduced herein as Appendix C for the convenience of the Court). The opinion in *Pittman v.*

Texas clearly shows that the practice followed in Texas is neither identical nor consistent with the practice followed in Illinois and which was condemned in *Witherspoon.*

Perhaps the most important section of the *Pittman* decision is the following portion which covers the traditional Texas practice and which was amply supported by the *Pittman* record:

> "It has long been the traditional practice in Texas, before and after the effective date of the 1965 Code, not to excuse a juror in capital cases who simply stated he had conscientious scruples against the death penalty but to interrogate such juror further to determine if this means that he or she could never vote for the death penalty. The challenge for cause on this ground has always been understood to mean that because of such scruples the juror could never vote to inflict the death penalty in any case regardless of the facts or circumstances. Until this appeared the challenge for cause was not sustainable. Such practice squares with the requirements of Witherspoon.
>
> "Normally, the prosecutor will clearly establish the juror's disqualification on this ground before challenging for fear that the juror may be re-qualified upon further interrogation and explanation by the defense or the court (See also Article 35.18, (617) V.A.C.C.P.), and then he will be confronted with the choice of accepting a juror who may have been offended by the premature challenge or unnecessarily using a peremptory challenge.
>
> "As earlier noted, prior to the 1965 Code of Criminal Procedure both parties could use the 'conscientious scruples' challenge for cause, and neither side wanted the other to have a 'windfall' without clearly determining that the juror's scru-

ples were such that he would automatically vote against capital punishment regardless of the facts. Such factor undoubtedly contributed to the growth of the traditional practice in this state."

Although this Texas decision was not available to the United States Court of Appeals when the opinion was written, it was called to their attention on petition for rehearing. The Court of Appeals refused to recognize *Pittman v. Texas* and overruled the petition for rehearing without comment.

In the opinion in *Pittman v. Texas* (supra) the Texas Court of Criminal Appeals stressed the fact that Judge Onion (and possibly the other judges) had read a transcript of the voir dire examination of the members of the entire jury panel in order to determine that the procedure in the *Pittman* case was actually consistent with the description of traditional practice set forth in the opinion. With this in mind, Petitioner (in motion for rehearing) offered to have the court reporter's notes transcribed and forward to the United States Court of Appeals for examination (Petitioner having theretofore ascertained that such notes were available as to the entire panel).

This tender of the voir dire examination was made in an effort to make full disclosure even though the burden of proof was still on Respondent at that time and even though the stipulation entered into before the court should have covered the matter. Petitioner still stands ready to furnish this record upon request to this Court, or to any court of competent jurisdiction, to show that the traditional Texas practice was followed.

And lest an argument be advanced that *Pittman v.*

Texas (Appendix B) is an effort by a Texas court to circumvent *Witherspoon v. Illinois* (supra) attention is called to the opinion of the Texas Court of Criminal Appeals in *Clarence Wesley Evans v. Texas,* 430 S.W. (2d) 502, (reproduced and attached hereto as Appendix D for the convenience of the Court) in which a death penalty was reversed because the trial court declined to have a stenographic record made of the voir dire examination of prospective jurors.

The Texas Court of Criminal Appeals has recently issued (October 30, 1968) three opinions applying *Witherspoon v. Illinois* (supra) to Texas cases (none of which are yet reported but all of which are attached hereto as appendices as indicated) to show that normal Texas procedure will render Texas cases outside *Witherspoon v. Illinois* but that the Texas Court of Criminal Appeals accepts and will apply the rationale of *Witherspoon v. Illinois* where applicable.

Ellison v. Texas, October 30, 1968 (Appendix E).

Ex parte William Clark Bryan, Jr., October 30, 1968 (Appendix F).

William Scott, Jr. v. Texas, October 30, 1968 (Appendix G).

Although Petitioner still feels that the stipulation discussed in Point A (supra) is dispositive of the issue, nevertheless Petitioner strongly urges that these cases disclose the importance of an inspection of the voir dire examination of prospective jurors if the express stipulation is insufficient. It would then seem incumbent on the Court of Appeals to either accept Respondent's tender or to order the lower court to receive and examine same.

These interpretations of Texas law are binding on the Federal Courts in their consideration of the issues covered by such opinions. *Cox v. New Hampshire,* 312 U.S. 569; *Poulos v. New Hampshire,* 345 U.S. 395; *Shuttlesworth v City of Birmingham,* 382 U.S. 87; *Cox v. Louisiana,* 379 U.S. 538.

WHEREFORE, PREMISES CONSIDERED, Petitioner urges the Court to grant a Writ of Certiorari to the United States Court of Appeals (Fifth Circuit) to review the errors alleged herein and to correct same.

Respectfully submitted,

CRAWFORD C. MARTIN
Attorney General of Texas

NOLA WHITE
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Assistant Attorneys General

By ----------

CERTIFICATE OF SERVICE

I, Howard M. Fender, a member of the Bar of the Supreme Court of the United States, do hereby certify that a copy of the foregoing Petition for Certiorari has been served on counsel for petitioner by depositing same in the United States Mail, postage prepaid, addressed to Mr. Anthony G. Amsterdam, 3400 Chestnut Street, Philadelphia, Pennsylvania; Mr. Michael D. Matheny, 635 San Jacinto Bldg., Beaumont, Texas; Mr. Jack Greenberg and Mr. Jack Himmelstein, 10 Columbus Circle, New York, New York, this the ____ day of _____, 1968.

HOWARD M. FENDER
Assistant Attorney General